IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34157-7-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSEPH RICHMOND,

Defendant/Appellant

Respondent's Brief

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ii. Dr. Stanulis was untimely disclosed to the state as a witness by the defense in violation of several discovery orders entered by the court and preclusion was an appropriate sanction.

b. The initial aggressor instruction is proper when there is a conflict in the evidence about whether the defendant engaged in acts that constitute being the initial aggressor raised by the defendant giving a different story to the jury than that given by two eye witnesses.

c. The court allowed proper cross examination of the defense witnesses, though the defense chose not to engage in questions regarding their drug use on the day of the assault.

d. Mr. Richmond's adopted his out-of-state conviction and prevented the court from conducting a comparability analysis based on his adoption of the conviction and thus has waived any objection to the conviction on appeal; the record is insufficient for the court to review this issue.

B. ISSUES PRESENTED

a. Did the trial court abuse its discretion by precluding evidence of the victim's drug use as the evidence was irrelevant and inadmissible with regard to the self-defense theory as there was no evidence presented that the defendant knew the victim had used methamphetamine and the victim's actions towards the defendant were not aggressive?

b. Did the trial court abuse its discretion in precluding an expert's testimony when the expert was untimely disclosed in violation of several discovery orders entered by the court?

c. Is the initial aggressor instruction proper when eye witnesses testify that the defendant left the conflict and came back armed with a board but the defendant has a different version of what happened?

d. When the court specifically rules the state's witnesses can be cross examined about any drug use that may have impacted their ability to perceive and or remember the events of the date in question, but the defense chooses not to ask them those questions, is remand appropriate?

e. When the defendant adopts an out-of-state conviction and precludes the court from engaging in a comparability analysis, can the defendant then object to that conviction on appeal when the record does not support any contention the out-of-state conviction would not count in the defendant's offender score?

C. STATEMENT OF THE CASE

Joseph Richmond was charged via Amended Information with Murder in the Second Degree. (CP at 1). The defendant was arraigned on his original information on September 26, 2014 and entered not guilty pleas and on the amended information on

October 3, 2014 (RP at 11, 16 – 17)[1]. On October 13, 2014 counsel for the state indicated that neither the state nor the defense were ready to enter an omnibus order as discovery was ongoing, although the state had filed an omnibus application asking for the names, addresses, and statements of any defense witnesses (RP at 19; CP at 140 – 41). A similar position regarding ongoing discovery was advanced to the court at the hearing on October 24, 2014 (RP at 21).

On October 31, 2014 there was an agreed motion to continue and the defendant entered a speedy trial waiver re-setting the trial date as discovery was ongoing (RP at 25 - 26). On November 17, 2014 the defense attorney representing Mr. Richmond indicated to the court that discovery was still ongoing and they requested a continuance of the trial again with another speedy trial that waived through April 4, 2015. (RP at 28). On January 5, 2015 the parties entered an agreed omnibus order where the defendant was ordered to "furnish results of scientific tests, experiments or comparisons and the names of the person who conducted the test," to disclose "the names and addresses of the defendant's witnesses and their statements except where

[1] At the time of arrest and charging, the victim was still alive and the charge was amended from Assault to Murder 2 when he died. (RP at 12)

privileged," and "to inspect physical or documentary evidence in possession of defendant or defendant's attorney, except where privileged" and the court ordered those things to be disclosed no later than two weeks before trial which was at that time set for April 14, 2015 (RP at 38, 42; CP at 142 – 45).

On January 30, defense filed a motion and declaration for an order to appoint a toxicology expert that was granted by the court (CP at 146 – 47; 148 – 49). On February 2, 2015 the parties indicated discovery was still ongoing and the defendant again waived speedy trial through May 1, 2015 and a new trial date was set (RP at 42). On February 5, 2015 defense filed a motion and declaration to appoint a forensic expert, Mr. Kay Sweeney that was granted (CP at 150 – 51; 152 – 53). On March 27, 2015 defense indicated they had "engaged" two experts in the case and needed time to consult with Mr. Richmond about those experts and indicated again that the defense would need more time and a continuance of the trial date was likely (RP at 43, 45). At a hearing on April 10, 2015 the court indicated its opinion about the age of the case, indicating parties had been given adequate time to prepare their cases (RP at 48). The court re-set the trial date and

noted on the scheduling order that it was the "final" order (RP at 49).

On May 29, the court was brought into a dispute about releasing evidence from the state's possession to a defense expert (RP at 59). The state informed the court that although defense had brought the experts into the case in February they didn't ask for an order to release the evidence to the expert until May (RP at 60 – 61). At another hearing on June 4, the parties informed the court they were working on the details of a protection order to facilitate the defense expert's review of the evidence (RP at 64). On June 12 the defendant again waived his speedy trial rights and requested a continuance to give the defense expert time to review the evidence and to prepare a defense (RP at 67). At that same hearing the state informed the court that the state had requested some specificity regarding the expected testimony of the defense experts to the defense. (RP at 71). On August 31, the defense indicated to the court that their expert (Kay Sweeny) was still examining the evidence and they needed more time to be ready for trial (RP at 80 – 82). At that hearing the state indicated to the court that although they had been requesting a copy of the protective order for the

examination of the evidence by the defense expert since June, it wasn't until mid-August that an order was provided.

On September 22, 2015 the defense filed their first witness list that listed Carl Wigren, Kay Sweeney, and Dave Predmore as witnesses to testify about "forensics" and "toxicology," although Dave Predmore's address was not provided to the state on this list (CP at 154 – 55). On September 25 the state noted a status conference to address the concerns the state had with defense complying with the discovery rules and providing timely discovery (RP at 89). The recently filed defense witness list listed three defense experts and the trial was three weeks away with no reports or indication of testimony of those experts provided by the defense to the state (RP at 90; CP at 154 – 55). Defense represented to the court that they expected a report from Kay Sweeny who had done the forensic testing and that the report would be provided to the state (RP at 91 – 92).

On October 2, 2015 the state represented to the court that it still did not have reports from any of the defense's experts listed on their witness list. (RP at 97 – 98). Defense indicated they also had an additional expert they were considering consulting (RP at 101). The defendant again agreed to waive his speedy trial rights and

requested a continuance for the purpose of being able to use the experts that had been retained and consulted (RP at 105). On October 12, 2015 defense filed a motion for funding for "Forensic Psychologist Robert Stanulis, Ph.D." that was amended, and then granted (CP at 156 – 66; 167 – 77; 178 – 79).

On October 29, 2015 the defense again requested a continuance with a speedy trial waiver signed by the defendant (RP at 110 – 111). Defense indicated Dr. Sweeney had not yet prepared a report (RP at 111). The state referenced the defense's retention of five experts although not all of them were on the defense witness list and the state requested a date definite for any reports being prepared by any experts, a list of which ones actually were expecting to testify and an ability to interview those who were not preparing a report (RP at 113 – 114). The court set a trial date (January 26, 2016), and a deadline for final witness lists to be filed: December 24, 2015 (RP at 116 – 117; CP 180). The court also required any expert reports to be disclosed to the state by November 25, 2015. (RP at 118; CP at 180). At a hearing on December 11, 2015 the state indicated they had one letter from a defense expert, one report from an expert and no interview yet with a third expert, but it was in progress (RP at 124 – 25). On

December 22, 2015 defense filed an amended witness list that included Carl Wigren, Kay Sweeney, and Dave Predmore (still no address provided), and added Robert G. Stanulis, Ph.D. (CP at 181 – 82).

On January 22, 2016 the state informed the court that it still had not been given interviews with all of the defense experts, one was still pending and the state only had two expert reports (RP at 128). The January 22 date was s date set by the court on October 29 as a date to argue motions in limine in preparation of trial (RP at 117), but the state could not proceed with motions in limine as the defense expert interviews were not yet complete (RP at 129, 162).

On January 27, 2016[2] the court heard arguments on the motions in limine filed by both parties (RP at 132). The state made several motions in limine regarding presentation of evidence including asking the court to preclude a lab report from the victim's hospital records indicating the presence of methamphetamine in the victim's blood at the hospital and any evidence related to prior drug use by the victim. (RP at 163 - 166; CP at 20 – 29). The court granted the state's motion to preclude

[2] The hearing occurred on January 27, but throughout the VROP is referenced in the footer on the page as "MOTION HEARING 1/22/16" in error.

the lab report and evidence regarding the bindle of methamphetamine that was found in the victim's pocket. (RP at 170 – 171; CP 30 – 39). The court specifically ruled that defense could ask witnesses (including Veronica Dresp and Lonnie Zackuse) questions that pertained to their ability to perceive and recollect testimony including use of substances but precluded defense from admitting evidence or prior drug use of the victim, who was not a witness (RP at 174, CP at 30 – 39).

Additionally the state moved to preclude several defense witnesses including Dr. Wigren, David Predmore, Dr. Robert Stanulis (CP at 20 – 29; RP at 174, 183, 186). The court asked the defense to provide information to the court about relevant testimony from Dr. Wigren before the court ruled on the state's motion to preclude (RP at 178). The defense never provided additional information about Dr. Wigren's testimony.

Dr. Predmore's proffered testimony was in regard to the effects of methamphetamine on a person (RP at 184). The court had precluded evidence regarding the victim's drug use. (RP at 174, 185, CP at 30 – 39). Based on that ruling, the court granted the state's motion to preclude Dr. Predmore's testimony as irrelevant (RP at 186, CP at 30 – 39).

The state moved to preclude testimony by Dr. Robert Stanulis who's proffered testimony was the effects of methamphetamine on people and the "fight or flight" response (RP at 186 – 187). Defense indicated he hadn't written a report and had not been responsive to emails or requests for interviews (RP at 188). The state made a record that since August, 2015 the state had requested reports, interviews, and anticipated testimony of the experts the defense had hired (RP at 189). Defense sent the state Mr. Stanulis' CV, but no other information and despite continuing the trial twelve times for more than a year, the defense had not provided required discovery to the state regarding Mr. Stanulis' testimony (RP at 189 – 90). Based on that record, the court precluded Dr. Stanulis' testimony and invited the defense to bring any additional information to the prosecutor if they had it. (RP at 190; CP 30 – 39).

Defense filed a motion to reconsider the court's ruling on preclusion that was argued the morning trial began, February 2, 2016. (RP at 221; CP at 68 – 77). The court denied the motion to reconsider. (RP at 223). At the hearing, the court also heard argument from defense about why Dr. Wigren should be allowed to provide testimony to the jury and also why the court should

allow previously excluded Dr. Stanulis to testify to the jury about the fight or flight response that included a lengthy discussion about the disclosure of the defense experts to the state in a timely and appropriate manner. (RP at 241 – 243; 244 – 249). The court maintained the prior ruling, Dr. Wigren was reserved and Dr. Stanulis was precluded (RP at 249).

At trial, Veronica Dresp testified that she had been in a dating relationship with Joe Richmond (the defendant) and they had lived together at 1101 East 3rd Street in Cle Elum and that she had lived in the house for more than a year prior to September 22, 2014(RP at 262 – 63, 265). On September 22, 2014 she and Mr. Richmond had gotten into an argument and she had gone to her friend Lonnie Zackuse's house, although she left many of her personal belongings in the 3rd Street house when she left (PR at 260, 265, 266, 428, 432). When she left the 3rd Street house, Mr. Richmond had kept her phone in his possession, but she and Lonnie communicated with him via text message, using Lonnie's phone (RP at 266, 433). Ms. Dresp testified that Mr. Richmond told her that if she didn't come get her stuff that night, it would be gone the next morning (RP at 267). Ms. Dresp told Mr. Richmond she would come back and get her things and headed to the 3rd

Street house with the assistance of her friends: Lonnie Zackuse and her other friend Dennis Higginbotham, the victim, taking Dennis' van to have enough room to get Ms. Dresp's belongings. (RP at 260, 267, 268, 434 – 35).

When they got to the house, someone "sped away" in a truck and Veronica began knocking on the back and front door; no one was answering but she should see Mr. Richmond inside the house (RP at 269). Veronica testified that she was angry and wanted her things and told Mr. Richmond that if he didn't open the door, she would kick it down to get her stuff and told him she would start with the shed and grabbed a crow bar to break into the shed where some of her things were kept (RP at 270, 271). At that point, Officer Rogers with the Cle Elum Police Department arrived on scene; she had been dispatched with Mr. Richmond called 9-1-1 to report that someone was breaking into his house (RP at 272, 548).

Veronica spoke to Officer Rogers, and waited while Officer Rogers went to speak to Mr. Richmond; when Officer Rogers came back, she told Veronica Mr. Richmond wouldn't let Veronica in the house that night, but that Veronica could come back tomorrow at 4:00 or 4:30 p.m. with a police officer for a civil

standby and Veronica agreed to this plan (RP at 273, 282, 436 – 37, 558). Officer Rogers testified that Mr. Richmond was agitated during this first encounter and that although he as "adamant" she could not come into the house, he was agreeable to her getting some of her things out of her Pathfinder that was parked outside (RP at 559, 560). Officer Rogers then left the house and Veronica went to tell Lonnie and Dennis what the plan was when Mr. Richmond came out of the house, called Veronica by name and yelled, "Why did it have to come to this?" (RP at 375, 283). Veronica approached Mr. Richmond and told him all she wanted was to get her things; particularly some clothes for work that she thought were in her Pathfinder that was parked in the yard (RP at 284). Mr. Richmond told her she could grab some things out of her Pathfinder, which had tires that had been damaged and couldn't be driven away (RP at 284).

Dennis and Veronica started unloading boxes out of the back of the Pathfinder while Lonnie opened the van in the driveway to put Veronica's belongings in (RP at 287). Mr. Richmond saw Dennis helping Veronica and started yelling at them because he wanted only Veronica getting things, but Veronica told him Dennis was helping her (RP at 287 – 88; 439).

Lonnie and Dennis were there only to assist Veronica in getting her things back from Mr. Richmond (RP at 283, 288, 434). Dennis told Mr. Richmond that they didn't want any problems, but that they wanted to help Veronica retrieve her belongings (RP at 439). They started unloading the boxes from the Pathfinder and into the van when Mr. Richmond started yelling at Dennis. (RP at 288). Veronica testified that eventually Dennis started yelling back at Mr. Richmond, telling Mr. Richmond that Dennis wasn't afraid of him and repeating that he was there to help Veronica get her things (RP at 290).

Veronica testified that Dennis was a "skinny old man," that Mr. Richmond was "a lot taller, stronger, younger" and remembered that Dennis did have a flashlight with him that night but he was the only one with a flashlight, which she thought was a Maglite type flashlight (RP at 261, 271, 287, 358). Lonnie Zackuse described Dennis as "a tiny guy" and that Mr. Richmond is bigger than Dennis (RP at 429, 430). Lonnie remembered Dennis having a small flashlight (RP at 439). Veronica and Lonnie both described Dennis being "frustrated" because Mr. Richmond wouldn't let Veronica get her things (RP at 290, 442).

Dennis started walking towards Mr. Richmond and Veronica grabbed the back of his shirt and told him to forget about it that they would just come back tomorrow (RP at 291). Dennis stopped for a second but Mr. Richmond yelled again at Dennis something that made Dennis turn back around and start walking towards Mr. Richmond again (RP at 291). Mr. Richmond told Dennis not to come any closer and went inside the house (RP at 292). Lonnie saw Dennis and Mr. Richmond speaking to each other, and remembered Dennis saying that they just wanted to get Veronica's belongings (RP at 439). Veronica turned to go back towards the van and tell Lonnie that they were just going to stop and come back tomorrow, walking away from the house when Mr. Richmond came running back outside with something in his hands and Mr. Richmond and Dennis started yelling at each other again. Veronica testified that she heard Mr. Richmond say, "If you come any closer" or "don't come any closer, I'm warning you," and Dennis took one step towards Mr. Richmond. (RP at 292,293, 294, 296). Mr. Richmond hit Dennis with a two by four, gripping the board in his hands like you would hold a baseball bat and swinging, striking Dennis in the head, making a sound like the sound of splitting rounds of wood (RP 292,293, 294, 296, 440).

Mr. Richmond hit Dennis in the left side of Dennis' head (RP at 443). Dennis spun around and fell face first on the ground right there (RP at 294, 443).

Lonnie testified that when Mr. Richmond went back inside the house before hitting Dennis, she was relieved and thought the altercation was over and they would be able to retrieve Veronica's things from the car but then Mr. Richmond came back outside (RP at 440). Lonnie said they were speaking and she heard Dennis say they just wanted to get Veronica's stuff and she saw that Mr. Richmond had a stick that he swung at Dennis and Dennis went down. (RP at 440). Lonnie couldn't remember if Dennis was holding the flashlight, but did say that Dennis did not have any weapons in his hand (RP at 441).

Veronica ran towards them and Mr. Richmond lunged towards her with the board still in his hands (RP at 294). Mr. Richmond ran back inside the house and Veronica ran towards Dennis, and rolled him onto his back while telling Lonnie to call 9-1-1 (RP at 299 – 300). Mr. Richmond left the house immediately in a truck with a trailer attached while Veronica and Lonnie waited for help to arrive (RP at 299,443). Lonnie remembered Mr.

Richmond telling them, “Get off my property or I’ll shoot you,” as he ran towards his truck to leave. (RP at 444).

As Lonnie and Veronica waited with Dennis, he was breathing hard, but was not talking (RP at 445, 526). Officer Rogers had only been gone from the scene for about five minutes and returned to the scene when the second call of the assault came across the radio (RP at 568). When the first medic arrived, it was clear that Dennis had some “severe head trauma.” (RP at 513, 526, 538). When paramedics arrived Dennis was unconscious the entire time they treated him at the scene and he was transported to Harborview (RP at 477, 480). At one point, the medics noted there was cerebral spinal fluid coming out of Dennis’ ear (RP at 529). Dennis died at the hospital in Seattle and King County Medical Examiner’s Office performed an autopsy on September 26, 2017 (RP at 606). No knives, weapons, or knife sheaths of any kind were ever located on the victim or in his clothes (RP at 608). Dennis died after being transported to Harborview Medical Center in Seattle and an autopsy was performed by the King County Medical Examiner’s Office; the cause and manner of death were homicide due to blunt force injury of the head. (RP at 822, 824, 845)

Although the court had specifically ruled that defense could ask Ms. Dresp and Ms. Zackuse about their drug use on that day which might have impacted their ability to perceive or remember the events, defense did not ask any questions about either Ms. Dresp or Ms. Zackuse's drug use during cross examination. (RP at 174, CP at 30 – 39; RP at 361 – 394; 461 – 69).

The defense presented testimony from Kay Sweeney that included an opinion that Dennis was in forward motion at the time he fell down after being struck but that the injury he suffered on his face and the skeletal fractures were a result of hitting a post after falling, not from being struck (RP at 914, 932). The defendant testified that he repeatedly told the victim to leave his property and after exchanging words, the victim approached him in a "fast" manner with a flashlight in his hands (RP at 992 – 94). The defendant went to shut his front door because he was afraid his dog was getting out, but then came back to where he was standing about three seconds later (RP at 994 – 95). The defendant testified that he and Dennis were arguing again and Dennis approached him and withdrew what the defendant thought was a knife from his belt and raised his arm like he was going to "strike" the defendant with the knife, so the defendant hit Dennis with the board (RP at 995).

In discussing the jury instructions, the state proposed WPIC 16.04 and referenced it as "the initial aggressor" instruction (RP at 1080, CP at 107). In discussing the instruction, the court read into the record the note on use for the instruction contained in the WPIC (RP at 1083). The state argued that Mr. Richmond's actions of going inside the house and coming back into the yard where the victim was located holding a board was provocation sufficient to necessitate giving the instruction (RP at 1083 – 84). Defense argued against the instruction and the court found there were facts to support giving the instruction (RP at 1085).

The jury found the defendant guilty of the crime of murder in the second degree (RP at 1174, CP at 109). At the sentencing hearing, the state prepared a proposed judgment and sentence that calculated Mr. Richmond's offender score to be five. (RP at 1195). The court specifically asked defense about any objections to the score and although defense made a statement about whether an Idaho conviction would be a crime here in Washington, ultimately, they agreed to the crime counting as a felony point against the defendant (RP at 1195 – 96). The court then specifically asked the defendant about his offender score, including the Idaho conviction, asking "So, a five for sentencing purposes, you're confident that's

accurate?" and the defendant answered "yes." (RP at 1197). Pursuant to that, the court imposed a standard range sentence of 240 months confinement with thirty-six months of community custody (RP at 1210). This appeal followed conviction.

D. ARGUMENT

a. The trial court did not violate Mr. Richmond's constitutional right to present a defense by precluding evidence that was untimely disclosed, irrelevant, and not admissible.

> This court reviews trial court decisions on the admission of evidence for abuse of discretion. *State v.* Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010).

i. The court did not err in precluding expert evidence because the defense failed to timely disclose the expert to the state

> CrR 4.7 governs discovery in criminal cases and "defines the discovery obligations of both the prosecution and defense." State v. Linden, 89 Wn. App. 184, 190 947 P.2d 1284 (1997). A defendant has "a continuing obligation" to promptly disclose the names and addresses of intended witnesses and

the substance of their testimony "no later than the omnibus hearing." Id.; CrR 4.7(b) (1). To enforce CrR 4.7, a trial court is given "wide discretion in ruling on discovery violations." Linden, 89 Wn. App. at 189 – 90. CrR 4.7(h) (7) lists sanctions for a party's failure to comply with any discovery rule. The trial court may "grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h) (7) (i).

In State v. Hutchinson the Washington State Supreme Court interpreted CrR 4.7(h) (7) to permit "exclusion of defense witness testimony as a sanction for discovery violations." 135 Wn.2d 863, 881, 959 P.2d 1061 (1998) cert. denied, 525 U.S. 1157 (1999) (relying on the "deems just" language in the rule). But exclusion of evidence is "an extraordinary remedy" that "should be applied narrowly." Id. at 883.

The Hutchinson court identified four factors that a trial court should consider in determining whether to exclude evidence as a discovery

sanction: "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." Id. at 883. The lack of express findings regarding the four factors does not preclude a reviewing court from evaluating those factors based on the record developed at trial. State v. Williams, 2015 Wash. App. LEXIS 3038, *11 (Div. 1, 2015)

Specifically, regarding discovery obligations and preclusion of an untimely disclosed defense expert as a sanction for discovery violations, the court of appeals cited this standard for review in State v. Williams. Id. In the Williams case, six months before trial defense had paid an expert to do some testing and then named the expert as a witness, although he was later removed from the witness list. Id. at 12. In the middle of the trial when an issue the expert could testify about became

contested, defense asked the expert to do the testing, got the results of the tests and the doctor's report and advised the court and the state they wished to supplement the witness list and read the expert. Id. The court initially allowed the expert to testify, despite the late disclosure, but when the issue his testimony was rebutting became moot, the court granted the state's motion to strike his testimony as a sanction for untimely disclosure. Id. On appeal, defense argued that preclusion was inappropriate as a discovery sanction and the court, applying an abuse of discretion standard and evaluating the four factors from Hutchinson, found the court acted within wide discretion to exclude the defense expert's testimony. Id. at 14 – 15.

The only witness that was precluded as a discovery sanction was Dr. Stanulis. Kay Sweeney was allowed to testify; Dr. Wigren was precluded as cumulative, although the court did allow the defense to bring additional information to the court about his testimony (defense did not do so); Dr. Predmore

was precluded based on the court's ruling that the victim's methamphetamine use was irrelevant. When looking to the four factors in Hutchinson and applying them to this case, it is clear that preclusion was an appropriate sanction.

First, considering the effectiveness of less severe sanctions: this was a trial that had been continued by the defense more than twelve times and was sixteen months old at the time it went to trial – the only available remedy for the court was a continuance, which was not reasonable given the number of times and chances defense had to make the expert known, available, and accessible to the state. Defense counsel indicated at one hearing to the court that Dr. Stanulis was being difficult to pin down regarding interview/report requests and a continuance was not likely to remedy that fact.

It is difficult to consider the second factor, the impact of witness preclusion on the evidence at trial and the outcome of the case, because defense only ever made vague assertions about what Dr.

Stanulis' testimony might be and never provided the court with an offer of proof or a summation of how the testimony was relevant except to discuss the "fight or flight" response. Although the reasonableness of the defendant's actions in assaulting Mr. Higginbotham were clearly at issue in the case, an expert's opinion about how stress may impact decision-making process, while potentially helpful to a jury, is also not outside of the jury's province or common understanding: when faced with a threat people have to decide how to respond. The defense was able to argue based on the defendant's version of the facts that his response was "reasonable" and it is unlikely an expert's opinion about this would have been helpful to the jury. Again, this is all speculation because Dr. Stanulis' opinions were never provided to the court or the state despite several court orders to do so.

The third factor weight heavily for preclusion: the extent to which the prosecution will be surprised or prejudiced by the witness's

testimony because the state had been asking for an opportunity to examine Dr. Stanulis' report, interview Dr. Stanulis, and prepare for cross examination of this expert for months without ever being given a meaningful opportunity to do so. The fact that the witness who was precluded was an "expert" is also a factor that weighs heavily for preclusion in this case because expert witnesses testimony takes a lot more time and energy to prepare for and to rebut, many times requiring the opposing side to have their own experts review the opinions of the defense expert and evaluate them. These opinions are not lay opinions that can be dealt with through routine cross examination procedures: bias, credibility, and or inconsistency, but instead require time, energy, and even at times a level of expertise in order to give the jury a complete picture and thoroughly rebut; without advance notice, this is not possible.

Lastly, the court should consider whether the violation was willful or in bad faith. This factor

also weighs heavily in favor of preclusion when the court looks at the record as developed and supplemented by the state. Twenty days after filing an initial witness list that did not include Dr. Stanulis, in October, 2015, the defense began requesting money for the expert services of Dr. Stanulis. Despite violating the court's order to have any reports to the state by November 25, a month later defense filed a witness list that for the first time listed Dr. Stanulis as a witness. It is important for criminal defendants to be able to explore defenses, and the court funded the investigation requested by defense, but the defense would not follow the court's orders to provide the relevant discovery to the state in a timely manner. Bad faith does appear on these facts.

In weighing all of the factors, at least three, arguably all four, weigh in favor of preclusion. Given that, the court did not abuse its discretion in precluding Dr. Stanulis as he was untimely

disclosed to the state and the trial court's decision to preclude Dr. Stanulis should be affirmed.

ii. The court did not err in precluding evidence of recent use of methamphetamine by the victim as the evidence was not admissible or relevant.

Evidence that a defendant seeks to introduce "must be of at least minimal relevance." State v. Darden, 145 Wn. 2d 612, 622; 41 P.3d 1189 (2002). Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). A criminal defendant has a constitutional right to present all admissible evidence in his or her defense. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But this right is not unfettered; the defendant must show that the proffered evidence is relevant. State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." ER 401. Relevance requires a "logical nexus" between the evidence and the fact to be established; the evidence must tend to prove, qualify, or disprove an issue. State v. Peterson, 35 Wn. App. 481, 484, 667 P.2d 645 (1983).

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.*

In a murder prosecution, the trial court properly excluded testimony of witnesses who would have testified only that the victim, a deputy sheriff, was intimidating or rude. State v. Hutchinson, 135 Wn. 2d. 863 (1998), cert. denied, 525 U.S. 1157 (1999). The trial court also properly

excluded testimony about specific violent acts committed by the victim, because evidence of a character trait must be in the form of reputation evidence, not evidence of specific acts. Id. Only those violent acts of victim known to defendant were relevant to his theory of self-defense. State v. Birnel, 89 Wn. App. 459, 949 P.2d 433 (1998), review denied, 138 Wn. 2d 1008 (1999). The self-defense justification must be evaluated from the defendant's point of view as conditions appeared to [him] at the time of the act. State v. Allery, State v. Allery, 101 Wn.2d 591; 682 P.2d 312 (1984). The jury must place itself in the defendant's shoes and judge the legitimacy of her act in light of all that she knew at the time. Allery, 101 Wn.2d at 594. The jury then uses this information to determine what a reasonably prudent person similarly situated would have done. State v. Wanrow, 88 Wn.2d 221, 236, 559 P.2d 548 (1977).

When deciding whether evidence of a witness's other crimes or bad acts is admissible under ER 404(b), a court must engage in a two-part inquiry: (1) whether the evidence is logically relevant and necessary to prove an element of the crime charged; and (2) whether its probative value is substantially outweighed by its prejudicial effect under this rule. State v. Barker, 75 Wn. App. 236; 881 P.2d 1051 (1994). Evidence of specific acts of conduct is inadmissible to prove the character of the person and that the person acted in conformity with that character. State v. Bell, 60 Wn. App. 561, 564; 805 P.2d 815 (1991). Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial. State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991) (citing State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974)).

The question the jury has to answer is what was going on from Mr. Richmond's perspective on

the night in question – whether or not Mr. Higginbotham had ingested or used methamphetamine is irrelevant if unknown to Mr. Richmond because other than Mr. Richmond's testimony there is no other evidence that supports Mr. Higginbotham being the initial aggressor.

One could imagine a situation where eye witnesses describe a witness being upset, angry, or aggressive and then the fact that they were potentially affected by a mind-altering substance may have a slightly higher probative value. Here that is not the case. At most Ms. Dresp and Ms. Zackuse described Mr. Higginbotham as being "frustrated" that Mr. Richmond wouldn't let the three of them retrieve Ms. Dresp's belongings. No one describes him being aggressive towards Mr. Richmond, although Ms. Dresp does say he was moving towards Mr. Richmond and yelling at him.

The information supplied by defense counsel that their expert would testify that methamphetamine "can" make someone aggressive

is speculative and the victim's methamphetamine use cannot help the jury decide any issue at fact when eye witnesses describe no aggressive behavior of the victim.

In balancing the admission of the evidence, the court properly considered that methamphetamine use is highly prejudicial. The facts of this case, although disputed by the defendant are essentially that Ms. Dresp who had every legal right to be at the house on 3rd Street brought a friend with her to retrieve her belongings from her house and from her own car. Despite her legal right to her own things and even, arguably, possession of the house and property, the defendant did not want her there and did not want the victim to help Ms. Dresp. The escalation of this entire incident lies solely on Mr. Richmond's shoulders who took it upon himself to attempt to exert a superior right to possess the property and the things that clearly belonged to Ms. Dresp. Without provocation, he screamed repeatedly at the victim

and at some point, the victim began pushing back on him because he wanted Ms. Dresp to be able to collect her things. The victim's toxicology report showing the presence of methamphetamine could not help the jurors decide any of the relevant facts. The only arguable relevance would be that sometimes methamphetamine users can be aggressive, without any connection to the victim. Defense's arguments to the court in hearings and in motions that the levels were "high" were speculative, not supported by any evidence and the methamphetamine use by the victim was unknown to the defendant.

The court made it clear that if the defendant had knowledge of the victim previously being aggressive towards him, that evidence was relevant and admissible. That is not what his toxicology level would show. It is conjecture upon conjecture: the victim had used some quantity of methamphetamine at some point that it was present in his toxicology during autopsy and sometimes

some people who use methamphetamine can be aggressive. This evidence is speculative and unhelpful to the jury as it invites them to consider the victim's methamphetamine use and potential side effects that are not supported by the facts as described by any of the witnesses.

Only the defendant described anything the victim did as "aggressive," although his description of the victim having or attempting to use a knife was not supported by any other evidence. It is easy to imagine that when repeatedly confronted by someone who is yelling and screaming at you, at some point, a person may respond in kind with words or even engage in that conflict; its outside human experience to think someone will stand idly by and be yelled at. The jury was able to consider this fact, the victim's actions, and the defendant's own conduct. The methamphetamine use was properly excluded as unhelpful and inflammatory.

b. Was it improper for the court to give the jury the initial aggressor instruction when the self-defense claim had been

raised and when the evidence was that the defendant had gone inside his home and come back outside with a board while yelling at the defendant even when the defendant disagreed with the eye witness account and testified differently?

An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a) (3); State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." State v. WWJ Corp, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). The proposition is well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (citing State v. Peterson, 73 Wn.2d 303, 306 438 P.2d 183 (1968)).

Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); State v. Dana, 73 Wn.2d 533, 539, 439 P.2d 403

(1968). On the other hand, it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. Albin v. National Bank of Commerce, 60 Wn.2d 745, 754, 375 P.2d 487 (1962); State v. Heath, 35 Wn. App. 269, 271 – 72, 666 P.2d 922 (1983). An aggressor / provoker instruction was also at issue in Heath, 35 Wn. App. at 271. It was there held that since there was conflicting evidence as to whether the defendant's conduct or the victim's blows precipitated the fight; the aggressor/provoker instruction was properly given. Id. at 271 – 72.

It is clear given the facts and testimony of the eye witnesses and the defendant that there is a disagreement about what occurred that night between Mr. Higginbotham and Mr. Richmond. The testimony from both of the eye witnesses is that the defendant left during the argument, went back inside the house and came back out with a weapon – the board. The defendant's version differs in that he picked up the board while standing outside and when the victim approached him with the flashlight. Looking at the evidence, this conflict arises to a situation where the jury

has to judge the credibility of the witnesses. If they believe Ms. Dresp and Ms. Zackuse, the evidence supports giving the aggressor/provoker instruction because Mr. Richmond's actions "created" a "necessity" for defense because he came back outside armed. Because there is a conflict in the testimony does not mean the instruction should not be given. Just like the situation presented in State v. Heath, the conflict in versions supports giving the instruction.

c. Is there error when a court allows cross examination on the drug use of a state's witness on the day in question to explore issues of credibility, perception, or memory and defense chooses not to engage in that examination?

It is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony. State v. Dault, 19 Wn. App. 709, 719, 578 P.2d 43 (1978); State v. Hall, 46 Wn. App. 689, 692, 732 P.2d 524, review denied, 108 Wash. 2d 1004 (1987); State v. Smith, 103 Wash. 267, 269, 174 P. 9 (1918). Decisions regarding cross-examination are often tactical

because cross-examination may not provide evidence useful to the defense, or it may open the door to damaging rebuttal. In re Pers. Restraint of Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001); State v. James, 2015 Wash. App. LEXIS 695, *25 (Wash. Ct. App. Division 2 Mar. 31, 2015)

The court specifically gave the defense permission to ask Ms. Zackuse and Ms. Dresp about any alleged drug use on the day in question during the motion in limine arguments. Defense had the ability to engage in a full cross examination of the witnesses and did not ask about their drug use on that day, although the court had ruled the questions could be asked. There is no error on the part of the court.

d. Can a defendant who admitted his prior conviction existed and affirmed his offender score raise an objection to the conviction for the first time on appeal when there is speculation that an out-of-state conviction would not count in calculating his offender score and the court did not engage in a comparability review because of the defendant's adoption of the felony and his offender score?

A sentencing court acts without statutory authority under the Sentencing Reform Act of 1981 when it imposes a sentence based on a miscalculated offender score. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. Brown, 60 Wn. App. 60, 70, 802 P.2d 803 (1990), review denied, 116 Wn. 2d 1025, 812 P.2d 103 (1991), overruled on other grounds by State v. Chadderton, 119 Wn. 2d 390, 832 P.2d 481 (1992).

The legislature purposefully created the SRA scheme broadly in order to "'ensure that defendants with equivalent prior convictions are treated "the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere."'" State v. Morley, 134 Wn.2d 588, 602, 952 P.2d 167 (1998) (quoting State v. Villegas, 72 Wn. App. 34, 38-39, 863 P.2d 560 (1993) (quoting State v. Weiand, 66 Wn. App. 29, 34, 831 P.2d 749 (1992))). The SRA instructs that "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525 (3). Once a sentencing judge determines the comparability of an offense, the judge

tallies “points” reflecting the legislature's unfettered judgment about the relative severity of such prior convictions and rounds down the sum “to the nearest whole number.” RCW 9.94A.525 (7) - (21). As illustrated under the SRA, crimes as diverse as premeditated murder and attempted kidnapping count the same number of points. RCW 9.94A.525 (4) (scoring anticipatory offenses as completed offenses), (9) (assigning three points for any serious violent offense), .030(45) (defining “serious violent offense”). And, convictions for attempt crimes are scored as if they were completed offenses. RCW 9.94A.525 (4). The SRA even provides that if the sentencing court is unable to find a “clearly comparable offense” for a federal felony, “the offense shall be scored as a class C felony equivalent.” RCW 9.94A.525 (3); State v. Jordan, 180 Wn.2d 456, 464, 325 P.3d 181, 185, (2014)

Given the legislature's broad purpose and the SRA's loose point assignment, the SRA is interpreted as requiring rough comparability—not precision—among offenses. See State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007) (noting “comparability analysis is not an exact

science"). The SRA does not require judges to "conduct the tedious task of comparing out-of-state criminal procedures to in-state procedures" as part of its comparability analysis, reasoning that such interpretation would be "clearly contrary to the purposes of the SRA." Morley, 134 Wn.2d at 596-98. Such an interpretation would defeat the SRA framework because it "would exclude every out-of-state conviction from a defendant's criminal history." Id. Legal comparability is satisfied when the elements of the foreign offense are comparable to those of a Washington offense. State v. Sublett, 176 Wn.2d 58, 87, 292 P.3d 715 (2012) (lead opinion); State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); State v. Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

There is nothing in the record to suggest that the defendant's out-of-state conviction for "Rape" from "Payette (Idaho) would not count against his offender score in Washington. Appellant cites a statute from Idaho that is not reflected anywhere in the record. Although a search for Idaho statutory code does show the rape statute as §18-6101, within that statute there are approximately eleven

different subsections included and ways of committing the offense[3]. Many of those sections do mirror Washington

[3] "RAPE DEFINED. Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with a penis accomplished under any one (1) of the following circumstances: (1) Where the victim is under the age of sixteen (16) years and the perpetrator is eighteen (18) years of age or older. (2) Where the victim is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the victim. (3) Where the victim is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent. (4) Where the victim resists but the resistance is overcome by force or violence. (5) Where the victim is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anaesthetic substance. (6) Where the victim is prevented from resistance due to an objectively reasonable belief that resistance would be futile or that resistance would result in force or violence beyond that necessary to accomplish the prohibited contact. (7) Where the victim is at the time unconscious of the nature of the act. As used in this section, "unconscious of the nature of the act" means incapable of resisting because the victim meets one (1) of the following conditions: (a) Was unconscious or asleep; (b) Was not aware, knowing, perceiving, or cognizant that the act occurred. (8) Where the victim submits under the belief that the person committing the act is the victim's spouse, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief. (9) Where the victim submits under the belief that the person committing the act is someone other than the accused, and the belief is induced by artifice, pretense or concealment practiced by the accused, with the intent to induce such belief. (10) Where the victim submits under the belief, instilled by the actor, that if the victim does not submit, the actor will cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against the victim; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule. The provisions of subsections (1) and (2) of this section shall not affect the age requirements in any other provision of law, unless otherwise provided in any such law. Further, for the purposes of subsection (2) of this section, in determining whether the perpetrator is three (3) years or more older than the victim, the difference in age shall be measured from the date of birth of the perpetrator to the date of birth of the victim. Males and females are both capable of committing the crime of rape as defined in this section." I.C. §18-6101 (2017).

state laws regarding rape, although Washington laws are separated into degrees.

What the record does show is that defense counsel made an inquiry into the out – of –state conviction and persuaded the state that the conviction should be counted as a "non-violent" versus a "violent" offense and then although alluding to some age requirements within the statute, without any statutory authority, adopted the conviction and affirmed the offender score.[4] The defendant also affirmed both the conviction and the inclusion of the conviction against his own offender score and agreed that his offender score was a five.

The trial court was in the position and was required to conduct the comparability analysis on the prior out-of-state conviction and decided not to do so based on reliance by the defense attorney and the defendant that the

[4] The defendant had also previously adopted the Idaho conviction in case 14-1-00023-4 where he plead guilty and was sentenced to Theft, 2nd and Possession of Controlled substance and the Idaho Rape conviction was counted in his offender score. Also in case 12-1-00250-8 the defendant plead guilty and was sentenced to Failure to Register as a Sex Offender and the Idaho conviction was listed in his "criminal history" section, although not counted in calculating an offender score because Failure to Register is an unranked offense and the score was listed as "N/A." (PLA 112 – 114). These certified convictions were marked as evidence by the state in trial for impeachment purposes, although not admitted.

conviction existed and should be counted against his offender score.

At most, if the court is concerned with the legality of the calculation of the offender score because there is no record of comparability made, remand is the most appropriate remedy to address this issue because the record contains no facts in evidence regarding the prior out-of-state conviction other than the name, date, and location of the crime as indicated in the judgment and sentence. [5]

CONCLUSION

For the reasons stated, the judgment and sentence should be affirmed.

Respectfully submitted August 17, 2017,

/s/
/s/ Jodi M. Hammond
Attorney for Respondent
WSBA #043885

[5] The defendant was sentenced with an offender score of five where the standard range for Murder in the Second degree is 175 – 275 months. Had the court excluded the Idaho conviction, his score would have been a four with a standard range of 165 – 265 months and his actual sentence of 240 months would still have been a standard range sentence.

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 08/17/17, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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